Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-10 OF 2011(W)
RAUS SHARIF CHIEF JUSTICE, SURIYADI, ZAINUN ALI, ABU SAMAH NORDIN AND RAMLY ALI FCJJ
6 NOVEMBER 2017

Civil Procedure — Pleadings — Issues not pleaded — Writ of action filed for declarations and refund of fixed deposit receipt ('FDR') — Claim based on negligence — Whether bank at liberty to uplift FDR without consent — Whether there was cause of action — Whether bank liable for breach of contract — Whether breach of contract stated in pleadings — Whether parties bound by pleadings — Whether decision based on issue not raised in pleadings liable to be set aside

The appellant was, prior to his death, the sole proprietor of a firm known as Omar Khayam Enterprise ('OKE'). His son ('PW2'), was substituted as a party to this appeal. OKE was given various banking facilities by the respondent amounting to RM15m. The appellant had authorised PW2 to sign all cheques on behalf of OKE in respect of OKE's account ('the account'). The respondent granted OKE an additional overdraft of RM300,000 ('the OD'). Subsequently, the appellant applied to the respondent to transfer the banking facilities enjoyed by OKE to Omar Khayam Enterprise Sdn Bhd ('the company'). A fresh joint and several guarantee for RM15,300,000 was duly executed by the appellant and PW2. The parties to the memorandum of deposit remain unchanged. The shareholders of the company, namely, PW2 and Rajah Sultan, sold their shares to one Sallim and two others, for RM550,000. The appellant later discovered that Sallim had, without his knowledge, used the company's cheque to withdraw RM300,000 from the company's OD account to purchase a cashier's order in the name of the appellant. Sallim then gave the cashier's order to the appellant as part payment of the purchase price of the shares. As a result of Sallim's action, the overdraft facilities of RM300,000 given to the company was fully utilised for an unauthorised purpose, unknown to the appellant. The company's cheque was signed by Sallim alone and this was in breach of the directors' resolution which required that the company's cheques must be signed by two signatories, namely Sallim and PW2. The appellant filed a writ of action against the respondent for certain declarations and for the refund of the fixed deposit receipt ('FDR'), alleging that the respondent had

negligently and without his consent, uplifted his FDR. The High Court dismissed the appellant's claim based on negligence, holding that the appellant had no cause of action in tort against the respondent as the overdraft was given to the company and not to the appellant. The High Court, however, found that the respondent was liable for breach of contract and accordingly granted the declaration that the respondent was not entitled to uplift the FDR without the appellant's consent and ordered the respondent to refund the FDR. Aggrieved, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal and set aside the judgment of the High Court on the sole ground that the appellant had abandoned his claim based on the tort of negligence. The Court of Appeal held that the appellant's cause of action was not based on a breach of contract but on the tort of negligence and the parties were bound by their pleadings. The appellant thus appealed against the said decision and was granted leave to appeal to this court on the following questions of law: (a) when evidence was led without objections at trial, could an appellate court reverse the decision of the High Court on the sole ground that the cause of action in negligence had been abandoned; and (b) was the plaintiff entitled to declarations of rights as pleaded.

Held, dismissing appeal with costs:

(1) The appellant's cause of action was based on negligence and not on a breach of contract. There was no clear averment that the appellant's case was based on contract and that the respondent had, in breach of the contract, uplifted the FDR without the appellant's consent. Not a single word of 'contract', let alone the breach of it, was stated in the pleadings. Parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. A decision based on an issue which was not raised by the parties in their pleadings was liable to be set aside (see paras 25–27).

(2) There was no evidence that the respondent had breached any term of the memorandum of deposit when it uplifted the FDR without the appellant's consent. The appellant's claim against the respondent was for the refund of his FDR which was uplifted to settle the outstanding amount in the overdraft account. The monies in the overdraft account were fully utilised due to the respondent's alleged negligence in honouring the cheque presented by Sallim without it being countersigned by PW2. It was patently clear that the claim was not based on a breach of contract (see para 39).

(3) The appellant could not plead ignorance and conveniently say that he did not know the terms of the agreement which he signed. Clause 6 of the memorandum of deposit expressly states that the respondent was at liberty, at any time, to withdraw the deposit and to apply the proceeds thereof in or towards the discharge of the appellant's account without

reference to him. The finding of the trial judge that the respondent was in breach of the contract in uplifting the FDR without the appellant's consent was contrary to cl 6 of the memorandum of deposit. It was also against the weight of evidence. The memorandum of deposit was signed by the appellant together with his son. The respondent had, before uplifting the FDR, written to the son for approval to uplift the FDR and the son consented to it in writing (see paras 42–43).

(4) The first question in this appeal was framed on the supposition that 'evidence is led without objections at trial.' In truth, there was no evidence adduced without objections to support the appellant's contention that the respondent was in breach of the contract, namely, the memorandum of deposit by uplifting the FDR without the appellant's consent. The respondent was clearly at liberty to uplift the FDR without the consent of the appellant by virtue of cl 6 of the memorandum of deposit. Thus, this court found that it was not necessary to answer the first question posed. In view of that, it was also not necessary to answer the second question. The Court of Appeal did not err in reversing the decision of the High Court on the sole ground that the cause of action in negligence had been abandoned (see paras 44–45).

[Bahasa Malaysia summary

Sebelum kematiannya, perayu adalah pemilik tunggal sebuah firma, Omar Khayam Enterprise ('OKE'). Anak lelakinya ('PW2') telah diganti sebagai pihak dalam rayuan ini. OKE diberi pelbagai kemudahan perbankan oleh responden berjumlah RM15 juta. Perayu telah memberi kuasa kepada PW2 untuk menandatangani semua cek bagi pihak OKE berkenaan akaun OKE ('akaun'). Responden memberi OKE overdraf tambahan RM300,000 ('OT'). Kemudiannya, perayu memohon kepada responden untuk memindah milik kemudahan perbankan yang dinikmati OKE kepada Omar Khayam Enterprises Sdn Bhd ('syarikat'). Satu jaminan baharu dan bersama berjumlah RM15,300,000 dimeterai oleh perayu dan PW2. Pihak-pihak dalam memorandum deposit kekal dan tidak berubah. Syarikat tidak diganti sebagai pihak dalam memorandum deposit sebagai ganti perayu dan PW2. Seterusnya, pemegang-pemegang saham syarikat, iaitu PW2 dan seorang bernama Rajah Sultan menjual saham mereka kepada seorang bernama Sallim dan dua orang lagi untuk RM550,000. Perayu kemudiannya mendapati bahawa Sallim telah, tanpa pengetahuannya, menggunakan cek syarikat untuk mengeluarkan wang sebanyak RM300,000 daripada akaun OT syarikat untuk membeli perintah juruwang bawah nama perayu. Sallim telah memberikan perintah juruwang kepada perayu sebagai sebahagian bayaran harga belian saham-saham. Akibat tindakan Sallim, kemudahan overdraf RM300,000 yang diberikan kepada syarikat digunakan sepenuhnya untuk tujuan yang tidak dibenarkan, tanpa pengetahuan perayu. Cek syarikat ditandatangani oleh Sallim sahaja dan ini melanggar resolusi pengarah yang menetapkan agar cek-cek syarikat

A ditandatangani oleh dua penandatangan, iaitu Sallim dan PW2. Perayu memfailkan tindakan writ terhadap responden untuk beberapa pengisytiharan dan untuk bayaran balik resit tetap deposit ('FDR'), dengan dakwaan bahawa responden telah cuai dan tanpa kebenarannya mengeluarkan FDR. Mahkamah Tinggi menolak rayuan perayu berdasarkan kecuaian, dengan B memutuskan bahawa perayu tidak mempunyai kausa tindakan dalam tort terhadap responden kerana overdraf telah diberikan kepada syarikat dan bukan perayu. Mahkamah Tinggi, walau bagaimanapun, mendapati bahawa responden bertanggungjawab atas pelanggaran kontrak dan membenarkan pengisytiharan bahawa responden tidak mempunyai hak mengeluarkan FDR C tanpa kebenaran perayu dan memerintahkan responden membayar balik FDR. Terkilan, responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan responden dan mengetepikan penghakiman Mahkamah Tinggi atas alasan perayu telah meninggalkan tuntutannya berdasarkan tort D cuai. Mahkamah Rayuan mendapati kausa tindakan perayu bukan berdasarkan pelanggaran kontrak tetapi tort cuai dan pihak-pihak terikat dengan pliding mereka. Perayu dengan itu merayu terhadap keputusan tersebut dan memberi kebenaran merayu ke mahkamah ini atas persoalan undang-undang: (a) di mana keterangan dikemukakan tanpa bantahan semasa E perbicaraan, bolehkah Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi atas alasan tunggal bahawa kausa tindakan berdasarkan kecuaian telah diabaikan; dan (b) sama ada plaintif berhak atas pengisytiharan hak seperti yang diplidkan.

F **Diputuskan,** menolak rayuan dengan kos:

(1) Kausa tindakan perayu berdasarkan kecuaian dan bukan pelanggaran kontrak. Tiada penjelasan yang jelas bahawa kes perayu berdasarkan kontrak dan bahawa responden telah, dalam melanggar kontrak, mengeluarkan FDR tanpa kebenaran perayu. Tiada perkataan 'kontrak', G atau pelanggarannya, dinyatakan dalam pliding. Pihak-pihak terikat dengan pliding dan tidak dibenarkan mengemukakan fakta dan isu yang tidak diplidkan oleh mereka. Keputusan berdasarkan isu yang tidak dibangkitkan oleh pihak-pihak dalam pliding mereka boleh diketepikan (lihat perenggan 25–27).

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(2) Tiada keterangan bahawa responden telah melanggar apa-apa terma memorandum deposit apabila responden mengeluarkan FDR tanpa kebenaran perayu. Tuntutan perayu terhadap responden untuk bayaran balik FDRnya yang telah dikeluarkan untuk menyelesaikan jumlah I tertunggak dalam akaun overdraf. Wang dalam akaun overdraf telah digunakan akibat kecuaian responden menunaikan cek yang diberi oleh Sallim tanpa tandatangan PW2. Amat jelas tuntutan bukan berdasarkan pelanggaran kontrak (lihat perenggan 39).

(3) Perayu tidak boleh memplidkan kejahilan dan menyatakan dia tidak tahu

tentang terma-terma perjanjian yang ditandatanganinya. Klausa 6 memorandum deposit jelas menyatakan responden bebas, pada bila-bila masa, untuk mengeluarkan deposit dan menggunakan hasilnya untuk pelaksanaan akaun perayu tanpa rujukan kepadanya. Dapatan hakim bicara bahawa responden melanggar kontrak dengan mengeluarkan FDR tanpa kebenaran perayu bertentangan dengan klausa 6 memorandum deposit. Ini juga bertentangan dengan keterangan yang dikemukakan. Memorandum deposit ditandatangani oleh perayu bersama-sama dengan anaknya. Responden telah, sebelum mengeluarkan FDR, meminta kelulusan anaknya untuk mengeluarkan FDR dan anak perayu telah membenarkannya secara bertulis (lihat perenggan 42–43).

(4) Soalan pertama dalam rayuan ini dibentuk atas anggapan bahawa 'keterangan dikemukakan tanpa bantahan semasa perbicaraan'. Sebenarnya, tiada keterangan dikemukakan tanpa bantahan untuk menyokong hujahan perayu bahawa responden telah melanggar kontrak, iaitu, memorandum deposit dengan mengeluarkan FDR tanpa kebenaran perayu. Responden mempunyai kebebasan mengeluarkan FDR tanpa kebenaran perayu menurut klausa 6 memorandum deposit. Oleh itu, mahkamah ini memutuskan tidak perlu untuk menjawab soalan pertama yang diajukan. Dengan itu, tiada keperluan juga untuk menjawab soalan kedua. Mahkamah Rayuan tidak terkhilaf apabila mengakas keputusan Mahkamah Tinggi atas alasan tunggal bahawa kausa tindakan cuai telah diabaikan (lihat perenggan 44–45).]

Notes

For cases on issues not pleaded, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7548–7568.

Cases referred to

Albion Hotel (Freshwater) Ltd v Maia E Silva & Anor [2002] IRLR 200 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd [2015] 6 MLJ 725; [2015] 9 CLJ 677, FC (refd)

Hadmor Productions Ltd and others v Hamilton and others [1982] 2 WLR 322, HL (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213; [1995] 2 CLJ 900, CA (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239, SC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)

Perniagaan Kinabalu (S) Sdn Bhd v Sua Ah Yoke & Ham Jon See [2002] MLJU 601, HC (refd)
Philipps v Philipps (1878) 4 QBD 127, CA (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308, CA (refd)
Rosita bte Baharom (an infant) v Sabedin bin Salleh [1993] 1 MLJ 393, SC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)
The Chartered Bank v Yong Chan [1974] 1 MLJ 157, FC (refd)
The County Council of Hereford and Worcester v Neale [1986] ICR 471, CA (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141; [2009] 6 CLJ 232, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Land Code (Cap 81)
Rules of the High Court 1980 O 15 r 16, O 18 r 7(1), (2)

Appeal from: Civil Appeal No W-02–722 of 2007 (Court of Appeal, Putrajaya)

Bastian Pius Vendargon (Gene Anand Vendargon with him) (YS Woo & Proctor) for the appellant.
Ben Chan (Mah-Kamariah & Philip Koh) for the respondent.

Abu Samah Nordin FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant, Sadar Mohd Roshan Khan (the plaintiff in the High Court) against the decision of the Court of Appeal which had set aside the judgment of the Kuala Lumpur High Court given in his favour. He had since passed away. On 18 March 2013, his son Raja Iftikar Ahmad Khan was substituted as a party to this appeal.

[2] The High Court had allowed the appellant's claims for a declaration that Perwira Affin Bank Bhd (the respondent) was not entitled to uplift his fixed deposit receipt No 049675 ('FDR') which was pledged to the respondent as security for an overdraft facility of RM300,000, without his consent and accordingly ordered the respondent to refund the FDR to him with interest at 8%pa from 18 March 1993 until realisation. The High Court found that the respondent was in breach of contract by uplifting the FDR without the appellant's consent. The Court of Appeal however allowed the respondent's

appeal and set aside the judgment of the High Court on the ground that the appellant's cause of action was for the tort of negligence, which it had abandoned and not for breach of contract.

[3] On 27 January 2011 the appellant was granted leave to appeal to this court against the decision of the Court of Appeal on the following questions of law:

(a) when evidence is led without objections at trial, can an appellate court reverse the decision of the High Court on the sole ground that the cause of action in negligence has been abandoned? and

(b) is a plaintiff entitled to declarations of rights as pleaded?

BACKGROUND FACTS

[4] The undisputed facts of the case are as follows:

(a) Sadar Mohd Roshan Khan ('PW1') was, prior to his death, the sole proprietor of a firm known as Omar Khayam Enterprise ('OKE');

(b) on 18 March 2013 his son, Raja Iftikar Ahmad Khan ('PW2') was substituted as a party to this appeal;

(c) OKE was given various banking facilities by the respondent amounting to about RM15m as at August 1990;

(d) on 13 April 1990 the appellant informed the respondent that he had authorised PW2 to sign all cheques on behalf of OKE in respect of OKE's account No 1102052687 ('the account');

(e) by another letter dated 16 April 1990 the appellant informed the respondent that he had authorised PW2, to operate the account and to do all things necessary to protect the respondent's interest. The letter further states that the appellant:

> agree to be responsible for due repayment of money due to you on the account or otherwise and purported to have been incurred on my/our behalf or on behalf of my/our firm by the authorised person whether such liabilities have been or shall be incurred in usual course of business or not and notwithstanding any default, omission, negligence or fraud on the part of the authorised person.

(f) on 22 December 1990 the respondent granted OKE an additional overdraft of RM300,000 ('the OD');

(g) the OD was secured by the FDR of RM200,000 vide FDR No 049675 dated 15 January 1991; and a personal guarantee of PW2;

(h) the terms and conditions of the FDR are contained in the memorandum of deposit dated 15 January 1991 which was executed by PW1 and PW2 in favour of the respondent. Paragraph 6 of the memorandum of deposit states:

> You are at liberty at any time to withdraw the deposit made under the said Deposit Receipt No 049675 or any Fixed Deposit from time to time substituted for or replacing the same and to apply the proceeds thereof in or towards the discharge of my/our accounts without reference to one/us. And a statement signed by anyone of your officer as the amount for the time being owing on my/our account shall be final and conclusive evidence against me/us for all purposes.

(i) on 31 January 1991 the appellant applied to the respondent to transfer the banking facilities enjoyed by OKE to Omar Khayam Enterprises Sdn Bhd ('the company'), which the respondent agreed, subject to the conditions that:

(i) a fresh joint and several guarantee for RM15,300,000, to be executed by Mr Sardar Mohd Roshan Khan and Mr Raja Iftikar Ahmad Khan; and

(ii) all facilities together with liabilities will be transferred from Omar Khayam Enterprise to Omar Khayam Enterprises Sdn Bhd; and

(j) a fresh joint and several guarantee for RM15,300,000 was duly executed by the appellant and PW2. The parties to the memorandum of deposit dated 15 January 1991 however remain unchanged. The company, Omar Khayam Enterprises Sdn Bhd, was not substituted as a party to the memorandum of deposit in place of the appellant and PW2.

[5] On 15 May 1991, the shareholders of the company, namely, PW2 and Rajah Sultan sold their shares to one Sallim bin Mohamed ('Sallim') and two others for RM550,000. PW2 was then the majority shareholder, holding 715,001 shares of the company. Rajah Sultan held only 1 share in the company. A deposit of RM100,000 was paid upon execution of the sale and purchase agreement.

[6] The balance of RM450,000 was to be paid by 15 July 1991. Sallim paid the appellant another sum of RM300,000 by way of a cashiers order dated 26 July 1991. The cashiers order was not paid to PW2 as he was actually holding the shares in trust for the appellant.

[7] The balance of RM150,000 was not paid as Sallim was arrested in Singapore on fraud charges and imprisoned for six years. Sallim's solicitors later told PW2 that nothing could be done as her fees and disbursement had not been paid by Sallim.

[8] The appellant later discovered that Sallim had, without his knowledge, used the company's cheque to withdraw RM300,000 from the company's OD account to purchase a cashiers order in the name of the appellant. Sallim then gave the cashiers order to the appellant as part payment of the purchase price of the shares. As a result of Sallim's action, the overdraft facilities of RM300,000 given to the company was fully utilised for an unauthorised purpose, unknown to the appellant. The company's cheque was signed by Sallim alone. This was in breach of the directors resolution dated 25 July 1991 which required that the company's cheques must be signed by two signatories, namely Sallim and PW2.

[9] On 4 March 1999 the appellant filed a writ of action against the respondent for certain declarations and for the refund of the FDR, alleging that the respondent had negligently and without his consent uplifted his FDR. The appellant named PW2 as the second defendant, alleging that PW2 had consented to the uplifting of the FDR without his authorisation. The appellant later withdrew the suit against PW2, leaving the respondent as the sole defendant.

[10] The appellant sought the following reliefs against the respondent:

(a) an order and declaration that the respondent should have obtained the consent from the appellant before uplifting the said FDR No 049675;

(b) an order and declaration that the respondent was negligent in honouring Perwira Habib Bank Malaysia Bhd cheque No 531000 dated 26 July 1991 when the same had not been countersigned by his son and accordingly the respondent was not entitled to uplift the said deposit receipt No 049675 against the said overdraft facility of RM300,000;

(c) an order and declaration that the respondent refund to the appellant the sum of RM231,155.60 with interest at 8%pa from 18 March 1993 to date of judgment and realisation; and

(d) costs.

[11] It is to be noted that in prayer (b), the appellant, quite surprisingly, is not asking the respondent to refund the sum of RM300,000 withdrawn from the overdraft account due to the respondent's negligence in honouring the said cheque without being countersigned by PW2. Instead, the appellant sought a declaration that the respondent was not entitled to uplift the FDR and for an order that the respondent refund the FDR.

A THE HIGH COURT

[12] The High Court dismissed the appellant's claim based on negligence, holding that the appellant has no cause of action in tort against the respondent as the overdraft was given to the company and not to the appellant. This is what the learned trial judge said:

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> When the cash cheque of RM300,000 was negligently and wrongfully honoured by the first defendant on 26 July 1991 then only the company was entitled to sue the first defendant for negligence and for the recovery of the said sum of RM300,000. The plaintiff has no cause of action in tort against the first defendant as the OD was given to the company and not to the plaintiff.

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[13] The High Court however found that the respondent was liable for breach of contract and accordingly granted the declaration that the respondent was not entitled to uplift the FDR without the appellant's consent and ordered the respondent to refund the FDR. The High Court held that the appellant has a cause of action for breach of contract and that the cause of action on contract arose when the respondent uplifted his FDR without his consent and in breach of the terms of the memorandum of deposit. The High Court held that the memorandum of deposit was between the appellant and the respondent and not between the company and the respondent. The High Court pointed out that the respondent failed to request the appellant to execute a fresh memorandum of deposit when the banking facilities were transferred to the company. This is how the learned trial judge justified his finding against the respondent for breach of contract:

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> Although the plaintiff has pleaded negligence on the part of the first defendant in honouring the cheque for RM300,000 the plaintiff's cause of action is for breach of contract and the cause of action only arose when the first defendant uplifted the FD and set it off against the OD of RM300,000 given to the company. Since no monies had been utilised by the company the first defendant was not entitled under the terms of the memorandum of deposit to uplift the FD. The act of uplifting the FD on 15 April 1993 was a breach of contract by the first defendant.

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[14] At pp 41–42 of his judgment the learned trial judge further explained:

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At p 41:

> The memorandum of deposit was a contract by which the plaintiff agreed that if any monies were owing by OKE the first defendant was at liberty to withdraw the FD and apply it to settle sums owing by OKE. In breach of contract the first defendant uplifted the FD on 15 March 1993 and set off same against the OD of the company.

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At p 42:

> Since the FD belonged to PW1 the consent of PW1 should have been obtained and not that of PW2. The FD did not belong to PW2 or the company. Even if

PW2 had agreed to the upliftment of the FD it was not within his power to do so. The plaintiff's consent was never obtained.

[15] The respondent, being aggrieved by the decision of the High Court, appealed to the Court of Appeal. The principal ground of appeal was that the learned trial judge erred in law and in fact in holding that the appellant's cause of action was for breach of contract (which was not pleaded) whereas the appellant's pleaded cause of action was based on the tort of negligence.

THE COURT OF APPEAL

[16] The Court of Appeal allowed the respondent's appeal and set aside the judgment of the High Court on the sole ground that the appellant had abandoned his claim based on the tort of negligence. The Court of Appeal held that the appellant's cause of action was not based on a breach of contract but on the tort of negligence. The parties were bound by their pleadings.

[17] Learned counsel for the appellant however urged the Court of Appeal to enter a declaratory judgment for the appellant pursuant to O 15 r 16 of the Rules of the High Court 1980, based on a breach of contract, contending that the Court of Appeal could still make a declaratory order in the absence of such pleading. Learned counsel for the respondent submitted that the appellant's cause of action was for the tort of negligence and not for breach of contract. As the appellant's counsel had conceded in his written submission before the High Court that the appellant has no cause of action in the tort of negligence, which was the appellant's pleaded case, the appeal by the respondent should therefore be allowed. The Court of Appeal agreed with the respondent that the appellant's cause of action was based on negligence as can be seen from paras 11, 12, 16 and 18 of the appellant's statement of claim and that the appellant had abandoned his claim based on negligence. At para 23 of its judgment, the Court of Appeal said:

> The omnipotent words 'negligently', 'negligence' and 'negligent' appear in the aforesaid paragraphs of the plaintiff's statement of claim. It is as clear as crystal that the plaintiff's statement of claim is an illustration of a classic case based on the tort of negligence, and not based on a breach of contract. The expression 'breach of contract' had never appeared at all, to say the least, it is non-existent'.

THE FEDERAL COURT

[18] There are two questions of law for our determination, namely:

(a) when evidence is led without objections at trial, can an appellate court reverse of decision of the court on the sole ground that the cause of action in negligence has been abandoned? and

(b) is a plaintiff entitled to declaration of rights as pleaded?

[19] Learned counsel for the appellant submitted that the appellant's pleaded case against the respondent was based on negligence as well as breach of contract.

Negligence:

(a) it was contended before us that the Court of Appeal erred in setting aside the judgment of the High Court on the sole ground that the appellant had abandoned his action based on the tort of negligence as this was not raised in the memorandum of appeal nor submitted upon. The court, in an adversarial system of justice should never decide a case on a point or issue not raised or submitted upon by counsel unless they have been given an opportunity to address that point first: see *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213; [1995] 2 CLJ 900, *Hadmor Productions Ltd and others v Hamilton and others* [1982] 2 WLR 322, *Albion Hotel (Freshwater) Ltd v Maia E Silva & Anor* [2002] IRLR 200, *The County Council of Hereford and Worcester v Neale* [1986] ICR 471; and

(b) this is disputed by learned counsel for the respondent who pointed out to us that the respondent's memorandum of appeal against the decision of the High Court stated clearly that the learned judge erred in law and in fact in allowing the appellant's claim based on a breach of contract (which was not pleaded) whereas his pleaded case was based on negligence.

[20] We find that the contention by learned counsel for the appellant is without merit for the following reasons. Firstly, the respondent's memorandum of appeal against the decision of the High Court expressly stated that the learned trial judge erred in allowing the appellant's claim based on a breach of contract when his pleaded case against the respondent was based on negligence. Secondly, the claim that the appellant was denied the opportunity of being heard is unfounded as it was the appellant himself who abandoned his cause of action based on negligence. Thirdly, the appellant did not appeal against the trial judge's ruling that the appellant has no cause of action in negligence.

BREACH OF CONTRACT

[21] The next thing to consider is whether the appellant's pleaded case is also based on a breach of contract. Order 18 r 7(1) and (2) of the Rules of the High Court 1980 lays down the basic rules of pleading:

(a) subject to the provisions of this rule and rules 10, 11 and 12 every pleading must contain, and contain only a statement in a summary form of the material fact on which the party pleading relies for his claim or defence, as

the case may be, but not the evidence by which these facts are to be proved, and the statement must be as brief as the nature of the case admits.

(b) without prejudice to paragraph (1) the effect of any document or the purpose of any conversation referred to in the pleading must if material, be briefly stated, and the precise words of the document or conversations shall not be stated, except in so far as those words are themselves material.

[22] The function of pleading is to give fair notice of the case which has to be met: *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393, *Perniagaan Kinabalu (S) Sdn Bhd v Sua Ah Yoke & Ham Jon See* [2002] MLJU 601. This is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarrass or mislead the opposing party: see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567; *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308. A good pleading should contain a statement of: (1) facts, not law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a summary form: see *Halsbury's Laws of England* (4th Ed, Reissue), para 13.

[23] What are material facts? All facts which must be proved in order to establish the ground of claim or defence are material: *Philipps v Philipps* (1878) 4 QBD 127 at pp 133–134. Parties are bound by their pleadings. This is a rule which will be strictly enforced by the court. Thus, where a party's case in based on a contract and the other party to the contract is in breach of it, these material facts must be pleaded.

[24] *Halsbury's Law of England*, at para 26 illustrates how a case based on contract should be pleaded:

> In pleading a contract it must be stated whether it is express or implied. The pleading should state the date of the alleged agreement and the names of all the parties to it. If the contract is express, it must be shown whether the contract is oral or in writing, and if the contract or any part of it is in writing, the document or documents must be identified. If the contract is not under seal, the consideration should be stated. If any contract or any relationship is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, the effect of the letters or conversations, or reference generally to the circumstances should be pleaded briefly, but not set out in detail. If the person pleading desire to rely in the alternative upon more contracts or relationships than one, each contract or relationship which is to be implied may be stated in the alternative.

[25] We agree with the Court of Appeal that the appellant's cause of action was based on negligence and not on a breach of contract. We have looked at the averments in the appellant's statement of claim. We are unable to find any clear

A averment that the appellant's case was based on contract and that the respondent had, in breach of the contract, uplifted the FDR without the appellant's consent. The appellant's cause of action based on negligence is clearly stated in paras 11 and 12 of the statement of claim:

B
> 11. Notwithstanding the above stated instructions, the 1st Defendant negligently allowed the said Sallim Bin Mohamad to cash a cheque No 53100 dated 26.7.1991 belonging to the said Limited Company for RM300,000 without the signature of the Second Defendant. As a consequence the said Overdraft Facility was completely utilised.

C
> 12. Despite the 1st Defendant's above negligence, the 1st Defendant then wrote to the 2nd Defendant stating that the 1st Defendant intended to uplift the said FDR which at that point of time amounted to RM231,393.00 in order to reduce the said Overdraft Facility of RM300,000.00.

D **[26]** Not a single word of 'contract', let alone the breach of it, is stated in the pleading. The appellant blamed his son (the second defendant) and sued him for unlawfully authorising the respondent to uplift the FDR. He later withdrew the suit against the son, leaving the respondent as the sole defendant in the suit.

E

[27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn* F *Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* G [1990] 2 MLJ 152. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

H

[28] Learned counsel for the appellant could not pinpoint to us that breach of contract was also the appellant's pleaded case against the respondent. He candidly admitted in his written submission that the appellant's 'plea of breach of contract lacked elegance'. Thus the appeal before us is not directly based on I the ground that the Court of Appeal erred in disregarding the appellant's pleaded case based on a breach of contract as that is bound to fail.

[29] The appellant's contention is that evidence of contract between the appellant and the respondent and the breach of it by the latter had been led at

trial without objections and as such the court is duty bound to consider the said evidence. The opposing party is deemed to have waived the requirement that the material facts relating to the contract must be pleaded. In such circumstance there was no element of surprise and prejudice. Learned counsel for the appellant relied on *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, *Perniagaan Kinabalu (S) Sdn Bhd v Sua Ah Yoke & Ham Jon See* [2002] MLJU 601, *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 in support of his contention.

[30] In *Boustead Trading (1985) Sdn Bhd*'s case the Federal Court at p 342 ruled that:

> Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and came to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded.

[31] In *Pekan Nenas Industries Sdn Bhd*'s case the plaintiffs ie Chang Ching Chuen & Ors (the respondents in the appeal before the Federal Court) brought an action in the High Court against the defendants, seeking, inter alia, a declaration that the sale of the lands to the purchaser, namely Pekan Nenas Industries Sdn Bhd was null and void. The plaintiffs obtained an injunction to prohibit the sale. The purchaser was allowed to intervene merely for the purpose of setting aside the injunction. The purchaser was not made a party to the suit between the plaintiffs and the defendants. At the trial, the purchaser through its chairman gave evidence without objection that the purchaser was a bona fide purchaser without notice. The High Court allowed the plaintiff's claim and set aside the sale but it ruled against the purchaser holding that the purchaser/intervenor was not a bona fide purchaser. The Court of Appeal affirmed the decision of the High Court. The defendants did not appeal. But the purchaser appealed to the Federal Court. The respondents contended that the purchaser/intervenor was never a party to the proceedings in the High Court and that the evidence on behalf of the purchaser was not supported by the pleadings. The Federal Court, in response to the contention that the matter was not pleaded, at p 503 said:

> No objection was taken to evidence being led on behalf of the intervenor/purchaser and the case was argued both in the High Court and on appeal to the Court of Appeal, as though the intervenor/purchaser was a co-defendant which had filed a pleading and it was on this basis that the case was heard and determined.

[32] Learned counsel for the appellant further stressed the point that evidence given at the trial could, in appropriate circumstance, overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise. One exception to the rule that evidence

given at trial without objection could overcome defects of pleading is when such evidence represents a radical departure from the pleadings, and it is not just a variation, modification or development of what has been alleged in the pleading in question: see *Perniagaan Kinabalu (S) Sdn Bhd*'s case.

[33] Learned counsel for the respondent submitted that the law on the question posed by the appellant is settled and had been adequately answered by this court in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567. In that case the respondents (plaintiffs) claimed that they have acquired native customary rights over certain lands by virtue of Sarawak's Land Code. They sought an injunction to restrain the appellants (defendants) from building on their land. The defendants in their defence denied that the appellants had acquired native customary rights over the said land. This defence was just a mere denial without further particulars as to any reason for such mere denial. But at the trial, evidence was given and admitted without objection as to why they denied the respondents claim that they had acquired native customary rights over the said land. One of the reasons was that the land were within a river bank reserve on which no one can claim any title thereon by virtue of Sarawak's Land Code. The other reason was that the land belonged to Sarawak Shell Oil Ltd.

[34] It was only in the final submission after the conclusion of all evidence that an objection was raised by the respondents for the first time that such defence were not pleaded. One of the issues which the Supreme Court in that case had to decide was this:

> Whether by allowing the appellants to adduce the evidence without any objection until such a late stage and not objecting to the evidence as and when the evidence emerged, the respondent were deemed to have waived the impropriety of admitting such evidence.

[35] The Supreme Court at p 190 (MLJ); p 567 (CLJ) said:

> Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent also, please see *Baerlein v Chartered Mercantile Bank* [1895] Ch D 488; similarly with technical rules of procedure. Therefore when such evidence represents a departure from pleading, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence as in the instant appeal. In these circumstances, the party facing such evidence at variance from pleading, by failing to object cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleading in question at that stage.

Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (FC) at p 278:

> Evidence given at the trial can therefore in appropriate circumstance overcome defect in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.

There is however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleading, and is not just a variation, modification or development of what has been alleged in the pleading in question, please wee *Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong* and *John Stein & Co Ltd v O'Hanlon* [1965] AC 890.

[36] The cases cited by both counsel to us clearly show that the law on the first question posed by the appellant is settled. It is this. In a case where the matter or material facts are not pleaded but evidence is led without objections at trial, the court is duty bound to consider such evidence although it may be a departure from the pleading. It has the effect of curing defect in the pleading. In such a case the opposite party is not taken by surprise, prejudiced, embarrassed or misled. The exception is where the evidence represents a *radical departure* from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 9 CLJ 677 is an illustration of a case where there was a *radical departure* from the pleading. In that case, loan, which was not a pleaded defence but evidence of it was adduced without objection was rejected as a defence as it was a *radical departure* from pleading, not just a variation, modification or development of what had been alleged in the pleading.

[37] The next question is whether there was evidence led without objections at trial, as contended by learned counsel for the appellant, that the respondent was in breach of contract by uplifting the FDR without the consent of the appellant. This is a question of fact which can only be determined by looking at the evidence.

[38] Learned counsel for the appellant did not pinpoint to us where, in the records of appeal that the appellant had led evidence, without objections that the respondent was in breach of contract by uplifting the FDR without his consent. Learned counsel for the respondent contended that there was no such evidence. PW1 or PW2 did not in their evidence allege that the respondent had

acted in breach of the terms of the memorandum of deposit when it uplifted the FDR without the appellant's consent.

[39] The appellant's case against the respondent was based on his own evidence (PW1) and his son's evidence (PW2). We have read PW1's and PW2's witnesses statements and their oral testimony before the High Court. We are unable to find any evidence from them alleging that the respondent had breached any term of the memorandum of deposit when it uplifted the FDR without the appellant's consent. The appellant's claim against the respondent is for the refund of his FDR which was uplifted to settle the outstanding amount in the overdraft account. The monies in the overdraft account were fully utilised due to the respondent's alleged negligence in honouring the cheque presented by Sallim without it being countersigned by PW2. The appellant explained the nature of his claim in his witness statement as follows:

> Q40. So what is your claim today?
>
> A. I want the 1st Defendant to refund the monies uplifted on 15.4.1993 amounting to RM233,155.60 and repay the same with interest.
>
> Q41. Why?
>
> A. Because what the 1st Defendant did was unlawful in that:
>
> (a) They should not have allowed Sallim to draw on the Overdraft Account of the company; and
>
> (b) They were negligent.

It is patently clear that the claim is not based on a breach of contract.

[40] It was contended that no fresh memorandum of deposit was executed when the banking facilities were transferred from OKE to the company. Therefore the FDR was never pledged as a security for the overdraft facility of RM300,000 which was transferred to the company. But this is contrary to the appellant's own testimony. He admitted, during cross-examination that the memorandum of deposit was also transferred to Omar Khayam Enterprises Sdn Bhd.

[41] This is what the appellant said in cross-examination:

> Q: So this is the Memorandum of deposit which you gave for the overdraft facility of RM300,000 is this correct?
>
> A: Yes
>
> Q: Was this Memorandum of Deposit also transferred to Omar Khayam Enterprise Sdn Bhd?
>
> A: Yes

Q: Do you know that one of the terms of this Memorandum of Deposit is that the bank is at liberty to withdraw from the fixed deposit receipt without reference to you or Raja Iftikar or Omar Khayam Enterprise?

A: No

Q: But you sign this agreement?

A: Yes.

[42] The appellant cannot plead ignorance and conveniently said that he did not know the terms of the agreement which he signed. Clause 6 of the memorandum of deposit expressly states that the respondent is at liberty at any time to withdraw the deposit and to apply the proceeds thereof in or towards the discharge of the appellant's account without reference to him.

[43] The finding of the learned trial judge that the respondent was in breach of the contract in uplifting the fixed deposit receipt without the appellant's consent was contrary to the cl 6 of the memorandum of deposit. It is also against the weight of evidence. The appellant himself admitted that the memorandum of deposit was also transferred to the company. It must be noted that the memorandum of deposit was signed by the appellant together with his son. The respondent had, before uplifting the FDR, written to the son for approval to uplift the FDR and the son consented to it in writing. The respondent's letter to the appellant approving the transfer of the banking facilities from OKE to the company was subject to the condition that, 'All facilities together with liabilities will be transferred from Omar Khayam Enterprise to Omar Khayam Enterprises Sdn Bhd'.

[44] We agree with the contention of learned counsel for the respondent that the first question was framed on the supposition that 'evidence is led without objections at trial'. In truth we find that there was no evidence adduced without objections to support the appellant's contention that the respondent was in breach of the contract, namely, the memorandum of deposit by uplifting the FDR without the appellant's consent. The respondent is clearly at liberty to uplift the FDR without the consent of the appellant by virtue of cl 6 of the memorandum of deposit.

[45] For the abovesaid reasons, we do not find it necessary to answer the first question posed to us. In view of our decision with respect to the first question we also do not find it necessary to answer the second question. In our judgment the Court of Appeal did not err in reversing the decision of the High Court on the sole ground that the cause of action in negligence has been abandoned.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor